



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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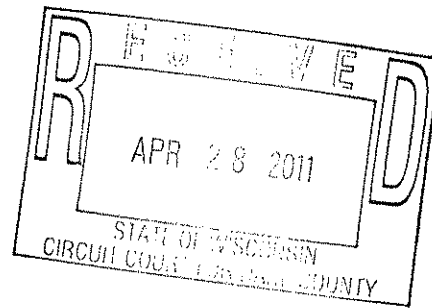
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April 28, 2011

**HAND DELIVERED**

The Honorable John W. Markson  
Circuit Court Judge, Br. 1  
Dane County Circuit Court  
215 South Hamilton Street, Rm. 6105  
Madison, WI 53703-3290

Re: *In Re Petition to Recall*  
Case No. 2011CV1660



Dear Judge Markson:

Enclosed for filing please find the Affidavits of Kevin Kennedy and David Buerger, which are offered in further support of the Wisconsin Government Accountability Board's Motion to Reopen, to Add Parties, and to Extend Deadlines for Good Cause Pursuant to Wis. Stat. § 9.10(3)(b), that was filed yesterday. I am serving copies of these affidavits on counsel for all parties by U.S. Mail and email on this date. Thank you.

Sincerely,

Lewis W. Beilin  
Assistant Attorney General

LWB:rk  
Enclosures  
c: Jeremy Levinson  
Eric McLeod  
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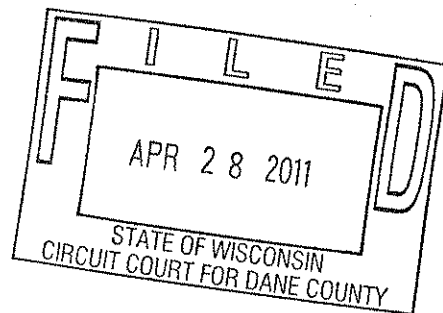
IN RE: PETITIONS TO  
RECALL SENATORS DAN  
KAPANKE, RANDY HOPPER,  
LUTHER OLSEN, DAVE  
HANSEN, SHEILA HARSDORF,  
ALBERTA DARLING, JIM  
HOLPERIN, and ROBERT WIRCH,

Case No. 11-CV-1660

SENATOR DAN KAPANKE,  
SENATOR RANDY HOPPER,  
SENATOR LUTHER OLSEN,  
SENATOR SHEILA HARSDORF,  
SENATOR ALBERTA DARLING,  
SENATOR DAVE HANSEN,  
SENATOR JIM HOLPERIN,  
SENATOR ROBERT WIRCH,

Hon. John W. Markson

COMMITTEE TO RECALL KAPANKE,  
COMMITTEE TO RECALL HOPPER,  
COMMITTEE TO RECALL OLSEN,  
COMMITTEE TO RECALL HARSDORF,  
COMMITTEE TO RECALL DARLING,  
RECALL DAVE HANSEN,  
JIM HOLPERIN RECALL COMMITTEE,  
TAXPAYERS TO RECALL ROBERT WIRCH, and



GOVERNMENT ACCOUNTABILITY  
BOARD,

Interested Parties.

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**AFFIDAVIT OF KEVIN J. KENNEDY**

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STATE OF WISCONSIN     )  
                                      )  
COUNTY OF DANE         )

Kevin J. Kennedy, being first duly sworn, deposes and states as follows:

(1) I am employed by the Wisconsin Government Accountability Board ("GAB") as the Director and General Counsel. I am making this affidavit in support of the GAB's request for additional time to complete its statutory duties under Wis. Stat. § 9.10(3) with respect to pending recall petitions offered for filing with GAB. I have personal knowledge of the matters discussed herein.

(2) The Board must meet to consider all recall petitions and challenges, rebuttals, and replies thereto. These meetings must be in-person given the practicalities involved.

(3) The Board schedules its meetings on a yearly basis. Eight meetings were scheduled for 2011 at which various expected matters would be considered.

(4) The next scheduled meeting of the Board is May 17, 2011. The Board has a full agenda for that meeting already. The staff does not have sufficient time to prepare the necessary materials for the Board to resolve challenges, rebuttals, and replies and determine the sufficiency any recall petition for the May 17, 2011 meeting.

(5) There are six members of the Board. However, on May 1, 2011, the current Secretary, Judge Gordon Myse, will step down from his seat on the Board as his term is ending.

(6) The names of three former Wisconsin judges have been given to Governor Walker as candidates to replace Judge Myse on the Board. However, it is unknown when Governor Walker will appoint a successor to Judge Myse.

(7) In the yearly planning for Board meetings, we do not "budget" for recall elections or recounts of election results, as these occurrences are extremely rare.

(8) The Board can only act upon the agreement of 4 of its members. (*See* Wis. Stat. § 5.05(1e) (“Any action by the board requires the affirmative vote of at least 4 members.”))

(9) Given the statutory requirement for Board action, and the reduction in the Board’s membership as of May 1, 2011, if even one Board member were unable to attend a meeting on recall petitions, then the four members present would have to vote unanimously to take any action on the recall petition. This makes it all the more crucial that all Board members be present for any meeting at which recall petitions will be addressed.

(10) I have been in contact with all the current Board members to determine their availability for meetings to address the recall petitions.

(11) On May 18, 19, and 20, Judges Barland and Cane cannot attend a Board meeting. For these days, this would leave us with only 3 judges and the Board could not act because it falls short of 4.

(12) On May 24, Judge Brennan cannot attend, leaving us with only 4 judges.

(13) On May 25, 26, and 27, Judges Brennan and Deininger cannot attend. For these days, this would leave us with only 3 judges and the Board could not act because it falls short of 4.

(14) May 30 is Memorial Day and no one is available.

(15) Based on my communications with the Board members, as well as the considerable demands currently being placed on GAB staff (*see* the Affidavit of David Buerger, filed herewith), I have concluded that it is not feasible for the Board to meet to consider the Kapanke, Hopper and Olsen petitions until May 23.

(16) Were the Board to file its certificate of sufficiency as to any of those three petitions during the week of May 23, then under Wis. Stat. § 9.10(3)(b), the Board would be

required to call the recall elections for July 5. This would require municipal clerks to be open for in person absentee voting on the July 4 holiday, plus preparing for the July 5 election. Wis. Stats. §§ 6.86(1)(b), 7.15 (1)(cm) I believe it is unreasonable to hold any election on July 5, one day after the July 4<sup>th</sup> national holiday. Therefore, I believe it is necessary that the Board file any certificates regarding those three petitions the following week, the week of May 31.

(17) Based on my communications with the Board members, as well as the considerable demands currently being placed on GAB staff (*see* the Affidavit of David Buerger, filed herewith), I have concluded that the Board could meet on May 31 to consider the remaining 5 petitions currently pending before GAB. This would give GAB staff sufficient time to review those petitions and consider the challenges, rebuttals, and replies, if any, and prepare the necessary materials for the Board members in advance of the meeting.

#### **A FEASIBLE AND REASONABLE MEETING AND CERTIFICATION SCHEDULE**

(18) In light of the difficulties in conducting the careful examination of recall petitions, considering challenges, rebuttals, and replies, and preparing and conducting Board meetings, within the current statutory time periods, *see* Buerger Affidavit, and the foregoing difficulties in convening Board members for meetings in the coming weeks, the GAB staff have prepared the following schedule for addressing all of the pending recall petitions:

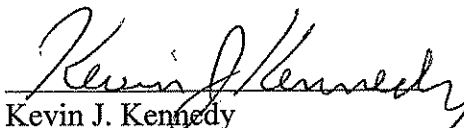
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| <b>May 23:</b>        | Board meeting to determine sufficiency or insufficiency of Kapanke, Hopper and Olsen petitions.  |
| <b>May 31 –June 3</b> | Board files certificates of sufficiency or insufficiency re: Kapanke, Hopper and Olsen petitions.                                      |
| <b>May 31</b>         | Board meeting on all other pending petitions offered for filing through April 21, 2011. (Harsdorf, Hansen, Darling, Wirsch, Holperin.) |

**May 31 – June 3** Board files certifications of sufficiency or insufficiency re: Harsdorf, Hansen, Darling, Wirch, and Holperin.

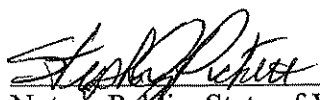
(19) The foregoing schedule is necessary to ensure that the GAB is able to conduct a careful examination of the recall petitions, as required by statute, and carefully, fully, and reasonably consider any challenges, rebuttals, and replies filed.

(20) If the Court accepts this schedule for GAB deadlines, the Court would still be able to extend the statutory deadlines for the recall committees and incumbent senators to file their challenges, rebuttals and replies, in the same way the Court extended the deadlines in the Kapanke and Hopper matters (i.e., by affording business days, rather than calendar days, for each of the deadlines regarding challenges, rebuttals, and replies).

Dated at Madison, this 28th day of April, 2011.

  
Kevin J. Kennedy  
Government Accountability Board  
212 E. Washington Avenue  
Post Office Box 7894  
Madison, WI 53707-7984

Subscribed and sworn to me  
this 28th day of April, 2011.

  
Notary Public, State of Wisconsin  
My Commission: 3/25/2012

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 1

DANE COUNTY

IN RE: PETITIONS TO  
RECALL SENATORS DAN  
KAPANKE, RANDY HOPPER,  
LUTHER OLSEN, DAVE  
HANSEN, SHEILA HARSDORF,  
ALBERTA DARLING, JIM  
HOLPERIN, and ROBERT WIRCH,

Case No. 11-CV-1660

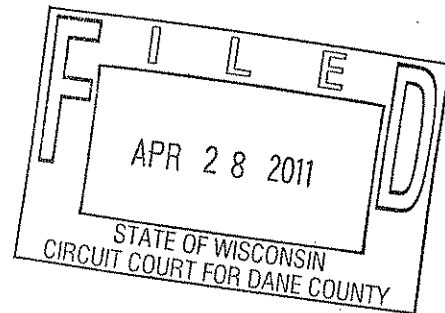
SENATOR DAN KAPANKE,  
SENATOR RANDY HOPPER,  
SENATOR LUTHER OLSEN,  
SENATOR SHEILA HARSDORF,  
SENATOR ALBERTA DARLING,  
SENATOR DAVE HANSEN,  
SENATOR JIM HOLPERIN,  
SENATOR ROBERT WIRCH,

Hon. John W. Markson

COMMITTEE TO RECALL KAPANKE,  
COMMITTEE TO RECALL HOPPER,  
COMMITTEE TO RECALL OLSEN,  
COMMITTEE TO RECALL HARSDORF,  
COMMITTEE TO RECALL DARLING,  
RECALL DAVE HANSEN,  
JIM HOLPERIN RECALL COMMITTEE,  
TAXPAYERS TO RECALL ROBERT WIRCH, and

GOVERNMENT ACCOUNTABILITY  
BOARD,

Interested Parties.



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**AFFIDAVIT OF DAVID BUERGER**

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STATE OF WISCONSIN     )  
                                      )  
COUNTY OF DANE         )

David Buerger, being first duly sworn, deposes and states as follows:

(1) I am employed by the Wisconsin Government Accountability Board ("GAB") as an Elections Specialist. I am also an attorney licensed to practice law in Wisconsin. I am one of the staff of the GAB Elections Division. I am making this affidavit in support of the GAB's request for additional time to complete its statutory duties under Wis. Stat. § 9.10(3) with respect to pending recall petitions offered for filing with GAB. I have personal knowledge of the matters discussed herein.

**THE PROCESS FOR REVIEW AND CERTIFICATION  
OF RECALL PETITIONS**

(2) The GAB is statutorily obligated to conduct a "careful examination," Wis. Stat. § 9.10(3)(b), of each recall petition offered for filing to the GAB. It must complete this "careful examination" within 31 days of the date that a recall petition is offered for filing. Wis. Stat. § 9.10(3)(b). If the GAB determines that a recall petition is sufficient, it states that determination in a certificate that it attaches to the petition, which is then filed. (Note: recall petitions are not officially "filed" until certified by GAB.) If a recall petition is filed, GAB must call a recall election to be held on the Tuesday of the 6th week commencing after the date of the filing of the petition. *See id.*

(3) The process of careful examination involves review of all of the pages of a petition for compliance with the requirements set forth in Wis. Stat. § 9.10(2)(a), (e) and (em). In particular, the GAB staff reviews each signature and each page of signatures to determine whether:



1. The page is clearly identified as a "RECALL PETITION" addressed to the Government Accountability Board for the recall of a particular officeholder and district.
2. There is a date for each signature.
3. The date for each signature is within the circulation period.
4. The date for each signature is the same or prior to the date on the certification for the sheet on which the signature appears.
5. The residency can be determined from the address given by each signature.
6. The municipality given for each signature is of a municipality within the district for which the elective official being recalled.
7. The circulator has signed and dated the certification.
8. The circulator has provided sufficient information to determine that he or she is a qualified circulator.

*See Wis. Stat. § 9.10(2)(a), (e)1. – 5., (em) 1. – 2.*

(4) GAB staff conducts a two-stage process to determine compliance with the requirements described above. In the first review, staff conducts a content-based examination of the petitions, by hand, using electronic and print resources to determine compliance. In the second review, staff reviews the determinations of the initial review, enters the verified signature tally into a spreadsheet for final tabulation, and creates a log of each signature determined in the first review to be non-compliant, itemizing those signatures by page number, line and reason for non-compliance. The purpose of creating this log is to enable the Board to efficiently review the petitions and consider any challenges, rebuttals and replies. For instance, there were approximately 30,000 signatures offered for filing by the Committee to Recall Darling, and to discuss compliance issues for so many signatures requires that some kind of organizing tool be created.

(5) If a challenge to a recall petition is filed, GAB staff will review all the materials submitted in support of and in opposition to the challenge (affidavits, other evidence, legal briefs, etc.).

(6) After reviewing the challenge, rebuttal and reply, GAB staff will prepare a memorandum on the petition, including an analysis of the compliance issues and an analysis of any challenge. This memorandum will be conveyed to the Board members for their consideration prior to meeting. This memorandum, and the other materials prepared by GAB staff for the Board prior to its meeting, constitute a significant part of the administrative record of the Board's decision making process regarding the petition.

(7) In other election-related matters, GAB staff normally try to provide memoranda and other materials to Board members 10 days prior to the Board meeting.

#### **CURRENT RECALL-RELATED DEADLINES FACING THE ELECTIONS DIVISION**

(8) There are currently 18 active, registered recall committees operating in Wisconsin, seeking to recall 16 incumbent Wisconsin State Senators. As of this date, 8 committees have offered their petitions for filing with the GAB.

(9) As of this date, recall petitions have been offered for filing by committees seeking recall elections for the Senate districts currently represented by Senators Kapanke, Hopper, Olsen, Harsdorf, Hansen, Darling, Wirch, and Holperin.

#### **The Committee to Recall Kapanke Petition**

(10) The current statutory deadline for filing a certificate of sufficiency or insufficiency of the Kapanke petition is May 2, 2011.

(11) The Court has extended the time for Senator Kapanke to file a challenge to the recall petition to **April 15**, and simultaneously extended the time of the Committee to Recall Kapanke to file its rebuttal to the challenge to **April 22** (both deadlines being calculated as business-day periods, rather than calendar days as otherwise required by statute).

(12) The Board, by its counsel, did not oppose Senator Kapanke's request for an extension of time to file his challenge.

(13) Given the Court's orders, Senator Kapanke had until **April 25** to file a reply to the rebuttal (the reply being due 2 calendar days from April 22, and since that deadline falls on a Sunday, it is due on the next business day. *See* Wis. Stat. § 990.001(4)).

(14) The Committee to Recall Kapanke did not make use of all its allotted time, and filed its rebuttal on April 19, 2011, making Senator Kapanke's reply due on April 21, 2011.

(15) Given the Court's extensions, GAB was left with 6 business days to review the challenge, rebuttal and reply, consider the issues, and prepare its memorandum to the Board. The Board must then, within the same period of time, consider the challenge materials, the staff memorandum, conduct a hearing on the petition, and issue its instructions to staff regarding the certification.

(16) Given the current burdens on GAB staff and resources, from the recall petitions and from other matters, GAB will not be able to meet the May 2, 2011, deadline for filing a certification of sufficiency or insufficiency on the Kapanke recall petition. (See more on this below).

#### **The Committee to Recall Hopper Petition**

(17) On April 7, 2011, the Committee to Recall Hopper offered for filing with the GAB a petition to recall Senator Hopper.

(18) The Hopper petition included approximately 22,500 signatures.

(19) The circuit court granted, in part, Senator Hopper's request for relief from the deadline applicable to his challenge, extending that deadline to April 21, 2011. *See* Case No. 11-CV-1753. Senator Hopper filed a challenge on that date.

(20) GAB believes the court's order also extended the deadline for the Committee to Recall Hopper to file its rebuttal, to April 28, 2011. The Committee did file a rebuttal, on April 27, 2011. Senator Hopper's reply, if any, is due by April 29, 2011.

(21) Given the current burdens on GAB staff and resources, from the recall petitions and from other matters, GAB will not be able to meet the May 9, 2011, deadline for filing a certification of sufficiency or insufficiency on the Hopper recall petition. (See more on this below).

#### **Six Other Petitions Offered For Filing**

(22) On April 18, 2011, the Committee to Recall Senator Olsen offered for filing a petition to recall Senator Olsen. The petition contained approximately 24,000 signatures; 14,733 valid signatures are required.

(23) On April 19, 2011, the Committee to Recall Senator Harsdorf offered for filing a petition to recall Senator Harsdorf. The petition contained approximately 23,000 signatures; 15,744 valid signatures are required.

(24) On April 21, 2011, 4 recall committees offered petitions for filing, seeking the recalls of Senators Hansen (18,872 estimated signatures; 13,852 are required), Holperin (23,300 estimated signatures; 15,960 are required), Wirch (18,300 estimated signatures; 13,537 are required), and Darling (30,000 estimated signatures; 20,343 are required).

(25) The table on the next (unnumbered) page shows the **current statutory deadlines** for the filing of post-petition challenges, rebuttals and replies, and the GAB's deadline to certify the sufficiency or insufficiency of the petitions. The table reflects the extensions granted by the circuit court in relation to the Kapanke and Hopper petitions.

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Current, un-extended statutory deadlines under s. 9.10(3)(b), *assuming* that each post-petition filing is made on the last allowable date. (By statute, the 5-day and 2-day deadlines are calculated from the date the prior paper is actually filed, not the prior statutory deadline). GAB's 31-day deadline, by contrast, is calculated from the date the petition is offered for filing.

Senator Name	Petition Offered for Filing	Challenge Due	Rebuttal Due	Reply Due	GAB Deadline
Kapanke	April 1	April 15 (per court order)	April 22 (per court order)	April 21 (rebuttal was filed early on April 19)	May 2
Hopper	April 7	April 21 (per court order)	April 28 (per court order)	April 29	May 9 <sup>1</sup>
Olsen	April 18	April 28	May 3	May 5	May 19
Harsdorf	April 19	April 29	May 4	May 6	May 20
Hansen	April 21	May 2 <sup>2</sup>	May 9 <sup>3</sup>	May 11	May 23 <sup>4</sup>
Darling	April 21	May 2	May 9	May 11	May 23
Wirsch	April 21	May 2	May 9	May 11	May 23
Holperin	April 21	May 2	May 9	May 11	May 23

<sup>1</sup> 31 days from April 7 is Sunday May 8; under Wis. Stat. § 990.001(4)(b) the deadline moves to May 9.

<sup>2</sup> 10 days from April 21 is Sunday May 1; under Wis. Stat. § 990.001(4)(b) the deadline moves to May 2.

<sup>3</sup> 5 days from May 2 is Saturday May 7; under Wis. Stat. § 990.001(4)(c) and (d) the deadline moves to May 9.

<sup>4</sup> 31 days from April 21 is Sunday May 22; under Wis. Stat. § 990.001(4)(b) the deadline moves to May 23.

## **CURRENT BURDENS ON THE RESOURCES OF THE GAB ELECTIONS DIVISION**

(26) The GAB Elections Division Administrator assigned 2 staff members full-time to the first review of recall petitions. I have been given authority by the GAB Elections Division Administrator to permit these staff to incur overtime as needed.

(27) It would not be prudent for the Elections Division to hire additional staff to assist with the second review process, as that work involves a higher degree of experience than we can reasonably convey to temporary hires brought in for a short time period.

### **The Statewide Recount of the Wisconsin Supreme Court Contest**

(28) On April 5, 2011, a statewide election for Justice of the Wisconsin Supreme Court was held. The unofficial vote count was extremely close by historic standards.

(29) On April 20, 2011, JoAnne Kloppenberg, candidate for Justice of the Wisconsin Supreme Court, formally asked GAB for a recount of votes statewide in the Supreme Court election.

(30) The GAB will supervise the recount of the Supreme Court election results.

(31) GAB has had to actively plan for the possibility of a statewide recount in the Supreme Court election since April 5, given the extremely close unofficial results. This process required the reassignment of the staff counsel primarily assigned to the recall efforts to recount preparations. Additionally, one of the staff assigned to assist with 2<sup>nd</sup> review has been subsequently re-assigned full-time to support the statewide recount. I have also been called upon to assist with recount preparations as needed.

(32) The recount will tax GAB staff resources significantly for at least the next 2 weeks.

(33) The recount has already necessitated some litigation, further taxing GAB staff resources. GAB commenced an action in this Court on April 22, 2011, to clarify certain matters regarding the conduct of the recount. (*GAB v. Prosser and Kloppenburg*, Case No. 2011-CV-1863 (Dane County)). Preparing for that court filing, and handling issues subsequent to the filing, has required the attention of several GAB staff, including the staff counsel that was reassigned from the recall efforts and the Director and General Counsel. This has taken away resources from the recall petitions matters.

#### **The Waukesha County Investigation**

(34) After the April 5, 2011, election, 6 GAB staff, 5 of whom were previously assigned to recall petition reviews, were dispatched to Waukesha County over a period of 5 days to investigate the handling of the election results. I was in Waukesha for 3 days. This unexpected but necessary task prevented GAB staff from otherwise working on the pending recall petitions.

(35) Subsequent to the onsite investigation, 5 GAB staff, including myself, have been tasked with writing the report summarizing our findings.

#### **The May Special Election**

(36) On May 3, 2011, there will be a Special Election for 3 vacant seats in Wisconsin State Assembly for the 60th, 83rd, and 94th Districts.

(37) The GAB Elections Division has primary responsibility for supervising the preparations, conduct, and post-election processes associated with the May 3, 2011, Special Election.



(38) As with any election, during the week prior to the May 3 Special Election (i.e., April 25-29), staff availability in the Election Division is extremely low for any tasks other than election-related work.

(39) Thus, I cannot ensure that we will be able to complete the necessary preparation for a Board meeting because the staff primarily responsible for the recall efforts will also have significant responsibility for handling Special Election duties and Board meeting preparations. This is particularly true for the staff counsel assigned to the recall efforts as our only other staff counsel will be exclusively assigned to the statewide recount matters.

#### **The Local Recounts**

(40) The April 5, 2011, election also spawned a number of recounts of local election results. These recounts began on April 11, 2011. GAB provides support to local election officials in conducting these recounts. This has diverted resources that might have been tasked to recall petitions work.

#### **The Mandatory Furlough of State Employees**

(41) Previously, the Department of Administration ordered all state employees to take no less than 128 hours of furlough over the current two-year budget cycle. Due to the extremely busy election cycle of 2010-2011, a number of GAB staff have not yet met their furlough obligations. All furlough hours must be used no later than June 17, 2011. This will reduce the number of GAB staff available to work on recall petition matters.

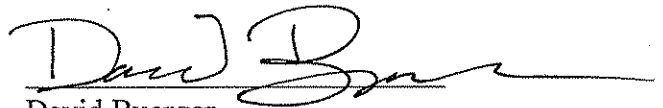
#### **The GAB's Post-Election Obligations**

(42) Subsequent to every state election, the GAB staff spend significant amounts of time conducting mandatory post-election activities including supervising the collection of election statistics in the Wisconsin Election Data Collection System, assisting local election

officials with recording voter participation in the Statewide Voter Registration System, and reconciling the data between these two systems to ensure data quality.

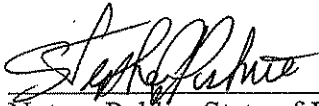
(43) GAB staff also assist local election officials with post-election cleanup of erroneous election records such as voter registrations in the wrong ward, canceling absentee ballots unreturned by voters, and assisting local election officials with their investigations into potential voter fraud.

Dated at Madison, this 28<sup>th</sup> day of April, 2011.



David Buerger  
Government Accountability Board  
212 E. Washington Avenue  
Post Office Box 7894  
Madison, WI 53707-7984

Subscribed and sworn to me  
this 28<sup>th</sup> day of April, 2011.



Notary Public, State of Wisconsin  
My Commission: 3/25/2012